H.M.T.Q. v. *William*, 2012 NWTSC 53

Date: 2012 07 06
Docket: S-1-CR-2011 000159

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN

HER MAJESTY THE QUEEN

Appellant

- and –

TONY DOLPHUS WILLIAH

Respondent

MEMORANDUM OF JUDGMENT

[1] The Crown appeals from the sentence imposed to Tony Williah for a number of charges that he pleaded guilty to on September 8, 2011. The Crown asserts that the Sentencing Judge made errors in principle that led to the imposition of a sentence that was not fit.

I) THE SENTENCING HEARING

A) The offenses for which Mr. Williah was sentenced.

[2] Mr. Williah was sentenced for 5 offenses.

1. Assault causing bodily harm on Lennie Nitsiza on August 29, 2010

[3] On August 29, 2010, Michael Williah, (Tony Williah's brother) was involved in an altercation with Lennie Nitsiza at the Williah home. Michael Williah had said something to a woman who was there, and Lennie Nitsiza took

offence to what he said. He challenged Michael Williah to a fight and the two men went outside the house. In the meantime Tony Williah arrived. Michael told him that Mr. Nitsiza had tried to kill him. The two brothers "jumped" Mr. Nitsiza, striking him with both fists and kicking him. Mr. Nitsiza was able to get away from them and ran to another house. Both brothers threw rocks at him as he was running away.

[4] Photographs of Mr. Nitsiza's injuries were filed as exhibits at the sentencing hearing. They show bruising and cuts to his face, a cut and bruising to his rib, and a cut to the inside of his lip.

[5] When this incident happened, Tony Williah was on process (a Promise to Appear and Undertaking to an Officer in Charge) for a charge of assault with a weapon alleged to have occurred on May 30, 2010. The Crown, ultimately, did not proceed with that charge.

2. Uttering threats to Chief Alphonz Nitsiza to cause death to Lennie Nitsiza on August 30, 2010

[6] On August 30, 2010, Tony Williah attended the Wha Ti community government office brandishing a 2 x 2 piece of wood that was about 4 feet long. He also had a sling shot in his back pocket. Mr. Williah was distraught and told Chief Alphonz Nitsiza that he had a rifle in his house and that he was going to "take out" Lennie Nitsiza. Mr. Williah then left. Chief Nitsiza decided to report this to the police because the matter seemed serious to him, in particular because of Mr. Williah's mention of a rifle.

[7] A transcript of Chief Nitsiza's statement to the R.C.M.P. was entered as an exhibit at the sentencing hearing. Defence counsel suggested that the whole of the statement needed to be considered to better reflect the context and Chief Nitsiza's account of the incident.

[8] The statement describes how Mr. Williah made reference to long standing and ongoing issues between his family and Lennie Nitsiza's family; that they had been giving him a hard time since he was a young boy; that he was saying that Chief Nitsiza should be doing something about this; that Mr. Williah, who is usually a quiet person, was very upset that day.

[9] After Chief Nitsiza reported the incident, R.C.M.P. members attended Mr. Williah's house and arrested him. He was later released on an Undertaking with respect to both this matter and the assault causing bodily harm charge from the

previous day. The Undertaking required him to appear before the Territorial Court on October 13, 2010 in Behchoko.

3. Failure to appear on January 25, 2011

[10] Tony Williah appeared before the Territorial Court on October 13, 2010. Matters were adjourned to November 19, and on that date, adjourned again to December 14. On December 14, the trials were set to proceed March 9, 2011. An interim appearance was set for January 25, 2011 for Mr. Williah to confirm that he had a lawyer and to confirm the March trial date. The interim appearance was scheduled for Behchoko at Mr. Williah's request, as he was expecting to be in that community at that time. On January 25, 2011, he failed to appear. The March trial date was cancelled and a warrant was issued for his arrest.

[11] Mr. Williah attended Court in Behchoko on March 9. He was arrested for his failure to appear in January. He was released on another Undertaking and his trials were scheduled to take place on July 13, 2011. On that date, Mr. Williah was in hospital and his trials were adjourned to proceed in September.

4. Sexual assault on L.M. on July 24, 2011

[12] On July 24, 2011, L.M.'s common law spouse had been drinking with Mr. Williah, at their residence in Behchoko. She went to bed. She woke up some time later to her common law spouse climbing into bed with her, and then went back to sleep. She woke up again, this time to Mr. Williah running his hand up her leg towards her groin and squeezing. By the time she came to full awareness Mr. Williah was lying on the floor near the bed. She kicked him and began kicking him out of her house. Mr. Williah said "I am sick, I have cancer", and apologized. She kicked him out of the house. She reported the matter to police shortly thereafter, in the early morning hours.

5. Breach of Undertaking on July 24, 2011

[13] The Undertaking that Mr. Williah entered into in March 2011 required him to reside at a specific residence in Behchoko and to not change address without the permission of the Court. After L.M. made the complaint regarding the sexual assault, it was discovered that Mr. Williah had moved and had been living for some time with his brother in N'Dilo. He had not obtained the Court's permission before moving, contrary to what his Undertaking required.

[14] Mr. Williah spent brief periods of time in pre-trial custody, a total of 7 days, before these matters were dealt with. He was in custody between March 9 and 11,

and again between September 3 and September 8, the date on which he was sentenced.

B) The positions of the parties and the Sentencing Judge's decision

[15] The Crown's position at the sentencing hearing was that a global sentence of 8 months imprisonment should be imposed for these offenses. Crown also asked that Mr. Williah be placed on Probation after his release. The Crown suggested that this Order include no-contact conditions with respect to the complainants, as well as conditions aimed at addressing Mr. Williah's issues with alcohol.

[16] The Crown argued that a jail term was required in light of Mr. Williah's criminal record, which includes some convictions that are related to the offenses he was being sentenced for; the pattern of behavior that he displayed from August 2010 through to July 2011, a period for which he was on process awaiting trial on various matters; the level of violence in the assault causing bodily harm charge; the fact that Mr. Williah was a guest in the home when he committed the sexual assault against L.M., and that she was in a vulnerable state, sleeping, when he assaulted her. Crown counsel concluded:

> So we have a year's worth of history of him committing offenses of violence and offences of breach of court order and I say that the last one is, there is some level of breach of trust evidence on those facts and in those circumstances a jail sentence is absolutely required and eight months is appropriate on a global consideration for the behavior giving due consideration to the early guilty pleas on the sexual assault charge and the guilty plea on the other charges. And in Crown's submission the probationary period to follow should be what is aimed at addressing the rehabilitative concerns for Mr. Williah.
>
> *Transcript of Sentencing Hearing*, p. 21, lines 2-16.

[17] Counsel for Mr. Williah provided the Sentencing Judge with detailed information about his personal circumstances, and in particular serious health issues that Mr. Williah had experienced during the period of time over which these offenses were committed.

[18] Counsel emphasized Mr. Williah's special circumstances and how difficult it had been for him to be in exile from his home community of Wha Ti and away from his family throughout his period of illness. Counsel appeared to acknowledge that a jail term was required for these offenses but argued that any such jail term could be served in the community. Counsel suggested that the gravity of the

offenses could be reflected in the duration of the sentence rather than by having it served inside a correctional institution:

> What I am suggesting to the Court, and obviously I have - - I am aware of the considerations, but what I am suggesting to the Court is that the Court consider that whatever sentence is appropriate be served in the community, I recognize that this is perhaps a brash proposal but I think there is a setup in place with his mother, who is here present in court today, where Tony could reside with his mother in Wha Ti, with the gravity of the offence, hopefully reflected in the length of such a sentence rather than in the need for it to be served in custody rather than in the community.
>
> Ms. William - - Sophie William is very much on board with this plan. It's certainly with her consent that he would be confined to her residence. And as to the quantum of time that the Court would feel would be necessary to reflect the gravity, I would leave that to the Court's appreciation.
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> *Transcript of Sentencing Hearing*, p. 28, line 23 to p. 29, line16.

[19] Immediately after hearing counsel's submissions the Sentencing Judge asked for submissions about whether a conditional sentence was an available sentencing option for the sexual assault charge, in light of section 742.1 of the *Criminal Code*, which provides that a conditional sentence is not available for an offence that is a "serious personal injury offence" as defined at section 752 of the *Code*. After a brief adjournment, the Sentencing Judge indicated that it was clear, in the French version of the provision, that the offence of sexual assault, when proceeded summarily, does not fall within the definition of "serious personal injury offence". No one expressed any objection to this interpretation. The Sentencing Judge then gave her Reasons for Sentence.

[20] The Sentencing Judge expressed the view that the circumstances of each of these offenses had a "twist" to them, when taking the context into account. With respect to the uttering threats charge, she concluded that while the charge was made out on the basis of Chief Nitsiza's statement, Mr. William's exact intentions were not clear, and the facts did not suggest that there was any immediate danger to anyone. With respect to the charge of assault causing bodily harm, she noted that in the circumstances leading up to the incident, the complainant, Mr. Lennie, had been the aggressor at one point; she also noted the passage of time since that incident and the uttering threats incident had occurred.

[21] With respect to the sexual assault offence, the Sentencing Judge noted that Mr. William was intoxicated at the time of the offence and that L.M.'s quick reaction had limited the harm caused to her.

[22] The Sentencing Judge considered Mr. Williah's criminal record. She noted the dates of the various convictions and concluded that his crimes of violence had been sporadic and situational.

[23] The Sentencing Judge also took into account Mr. Williah's personal circumstances, including the medical issues he faced and the fact that he had recently undergone surgery. She concluded that those medical issues were still having a significant impact on him:

> He is obviously in a great deal of pain and is heavily medicated
>
> *Transcript of Sentencing Hearing*, p. 37, lines 20-22.

[24] The Sentencing Judge concluded that the time that Mr. Williah had already spent in custody was sufficient to achieve the objectives of denunciation and deterrence, and that nothing would be accomplished by the imposition of a further jail term.

[25] She imposed a sentence of 1 day in jail, deemed served by Mr. Williah's presence in Court, to be followed by a period of Probation of 1 year. The conditions of the Probation Order included reporting conditions, no-contact conditions with respect to Lennie Nitsiza and L.M., that he take counselling as directed, and that he not consume alcohol for the first 6 months of the Probation period.

II) ANALYSIS

[26] The Crown acknowledges the wide discretion given to sentencing judges and the limited scope for appellate intervention on sentence appeals. The Crown nevertheless argues that this case does warrant appellate intervention because the Sentencing Judge erred in principle in this matter and imposed a sentence that is demonstrably unfit.

A) Errors in principle

1. Failure to give counsel an opportunity to make further submissions

[27] Crown argues that the Sentencing Judge erred in principle because she failed to put counsel on notice that she was considering imposing a sentence outside of the range that they were proposing.

[28] The Crown was asking that a term of incarceration of 8 months be imposed. While Defence counsel never used the term "conditional sentence" in his submissions, the only reasonable interpretation of his submissions, including the excerpt quoted above at Paragraph 18, is that he was conceding that a jail term was required but was suggesting that Mr. Williah should be permitted to serve that jail term in the community. It is apparent from the question the Sentencing Judge asked counsel at the end of their submissions that she too understood Defence counsel to be asking that a conditional sentence be imposed.

[29] It is the Court's ultimate responsibility, and not counsel's, to decide what a fit sentence is. But there has been an increasing recognition that in order to preserve the fairness of the process, sentencing judges have a duty to put counsel on notice where they are inclined to impose sentences that are outside the scope of what counsel are suggesting.

[30] That obligation is well established in situations where counsel present a joint submission. A sentencing judge who is not inclined to follow a joint submission must advise counsel of this and provide them with an opportunity to present further submissions as to why the joint submission should be followed. *R.* v. *G.W.C.*, 2000 ABCA 333; *R.* v. *Tkachuk*, 2001 ABCA 171.

[31] It is also recognized that counsel should be given the same opportunity, even when no joint submission is presented, where the sentencing judge is inclined to impose a sentence outside the range that they have proposed. *R.* v. *Abel*, 2011 NWTCA 4; *R.* v. *Burback*, 2012 ABCA 30.

[32] The rationale for requiring sentencing judges to put counsel on notice in these situations is based on the importance of preserving the fairness of the process to all parties. It recognizes that even in the absence of a joint submission, an accused's decision to plead guilty, or the Crown's decision to take a certain position on sentence, may well be the result of discussions between counsel, including discussions as to what their respective positions on sentencing will be. And even when a joint submission is not put forward, the positions taken by the parties may be based on factors that are not readily apparent from the record. So where a judge is inclined to depart significantly from the ranges being proposed, counsel should be given an opportunity to make additional submissions to support the position that they are advancing. *R.* v. *Burback* 2012 ABCA 30, at para. 12.

[33] The requirement for notice also takes into account the dynamics of sentencing hearings and the criminal litigation practice. Counsel have an obligation to present submissions in support of the position they are advancing.

They are expected to tell the sentencing judge not only what they are saying the sentence should be, but also why.

[34] But in presenting those submissions, counsel are likely to be focused on persuading the sentencing judge of the soundness of their position, and on explaining why the position advocated by the other party should not be accepted. Thus, if, having heard the facts and the submissions, the sentencing judge's view of the matter is completely outside the scope of what is being contemplated by counsel, counsel should be made aware of this and be given an opportunity to address whatever the sentencing judge's concerns are.

[35] This principle is engaged if a sentencing judge is considering a range of sentence markedly different than what either side is proposing. For example, in *Abel*, the sentence imposed was a jail term of 18 months, while the Crown had suggested a range of 7 to 9 months.

[36] The same principle is also engaged if the sentencing judge is considering imposing a sentence that is "substantially different in kind" from what is being proposed. *R.* v. *Burback*, para.18.

[37] There are significant differences, from a legal standpoint, between a conditional sentence and a term of Probation, even though both are community based dispositions that do not involve incarceration. In this case, as Crown and Defence agreed that the imposition of a further jail term was appropriate in the circumstances, it would have been preferable for the Sentencing Judge to advise counsel that she was not inclined to impose any further jail term, beyond the nominal 1 day served by the appearance in Court.

[38] On the other hand, the difference between the sentence that was imposed and what counsel had suggested was not as significant as it was in *Abel*. The fundamental dispute between Crown and Defence at this sentencing hearing was whether it was necessary, to achieve the objectives of sentencing, that Mr. Williah be incarcerated.

[39] Crown counsel had addressed why it was, in her view, necessary that Mr. Williah be incarcerated to achieve the objectives of sentencing. She had noted the aggravating factors of the various offenses committed by Mr. Williah, the persistence of his conduct over a period of time, and his criminal record. She had underscored the need for the sentence to address the principles of specific and general deterrence as well as denunciation.

[40] Crown counsel did not make any reply submissions after Defence counsel made his plea for a community based disposition. Presumably, this is because she felt – and rightfully so in my view – that she had already addressed the reasons why the Crown's position was that actual incarceration was required.

[41] In the circumstances of this case, because thorough submissions had already been made for and against a community based disposition, I am not persuaded that the Sentencing Judge's failure to signal her inclination not to impose a further jail term compromised the fairness of the hearing. I conclude that this ground of appeal must fail.

2. Failure to take into account the principles of deterrence and denunciation

[42] In oral argument on the appeal, the Crown argued that the Sentencing Judge also erred in principle because she overlooked the principles of deterrence and denunciation. The Crown notes that the Sentencing Judge did not make reference to those principles in her Reasons for Sentence.

[43] In my view, this argument is without merit. A sentencing judge is presumed to know the law and is not required to make reference to all the sentencing principles that she is applying. She is not required to demonstrate her awareness of all those principles, particularly when counsel have referred to them in their submissions. The fact that reasons for sentence do not specifically mention a sentencing principle should not lead to the assumption that that principle was not considered. The real question is whether the sentence imposed is demonstrably unfit, having regard to the overall circumstances, including the applicable sentencing principles.

B) Fitness of sentence

[44] The Crown argues that the sentence imposed is not fit and does not adequately reflect the seriousness of the offenses committed by Mr. Williah, particularly with respect to the offenses of assault causing bodily harm and sexual assault.

[45] The fundamental principle of sentencing, which informs in large measure the issue of fitness, is proportionality: a sentence must be proportionate to the seriousness of the offence and the degree of responsibility of the offender. *Criminal Code*, section 718.1.

[46] The Reasons for Sentence show that the Sentencing Judge considered that the circumstances of each of these offenses were somewhat unusual. In large measure, I agree with her assessment.

[47] Breaches of Court orders are always of concern. But neither of the breaches committed by Mr. Williah were at the most serious end of the scale for this type of offence. One was a failure to appear before the Court on an interim appearance; witnesses were not inconvenienced. Mr. Williah did end up appearing on the day that had originally been scheduled for his trials.

[48] As for the failure to obtain the Court's permission before changing addresses, it arose when Mr. Williah moved in with his brother after his relationship with the woman he was living with in Behchoko ended. He was clearly guilty, as he acknowledged, of not having first obtained the Court's permission. But this is not an offence that would, in and of itself, require the imposition of a jail term.

[49] As for the uttering threats charge, the Sentencing Judge concluded that while on the whole of Chief Nitsiza's statement, the charge was made out, it was not entirely clear what Mr. Williah had in mind and it was not established that anyone was in any immediate danger, disturbing as the event was for Chief Nitsiza. Again, this was not an unreasonable conclusion in light of the evidence.

[50] Dealing with the assault causing bodily harm on Mr. Lennie, the most aggravating feature of that offence was that it involved two people attacking one. It is also somewhat aggravating that the offenders threw rocks at the victim as he was running away from the scene. But as the Sentencing Judge noted, Mr. Lennie was the one who initially challenged Michael Williah to fight, and Tony Williah only became involved when Michael told him that Mr. Lennie had tried to kill him.

[51] Michael Williah was also charged in relation to this incident. He was convicted after trial and received a 4 month conditional sentence followed by 6 months Probation. At the hearing of the appeal the Crown argued that the difference between the two sentences offends the principle of parity. I disagree.

[52] Michael Williah's criminal record is more significant than Tony Williah's; Michael Williah was the one involved in the initial altercation with Mr. Lennie and he was the one who incited his brother to get involved in the fight by claiming that Mr. Lennie had tried to kill him; and Michael Williah did not have the benefit of the mitigating effect of having pleaded guilty. Although both offenders were found guilty in connection to the same incident, the differences between their

respective circumstances are such that the the differences in the sentences imposed are justified.

[53] This leaves the sexual assault offence. Of the offenses Mr. Williah was sentenced for, it was the most serious.

[54] In describing the circumstances of this offence, the Sentencing Judge said:

> I take into consideration with respect to the sexual assault, again, the circumstances of the assault. It was stroking the leg of a woman who was asleep and in whose house he had been drinking. She reacted by kicking him out of the house and, at best, the gesture was prompted by his consumption of alcohol. It did not result in further harm to the complainant because of her quickness to react. So it takes away nothing with respect to how inappropriate and unlawful the action is but the damage was limited and in and of itself I don't believe that this act would justify a jail sentence.
>
> *Transcript of Sentencing Hearing*, p.36 line 18 to p. 37 line 4

[55] While the level of intrusiveness of this particular sexual assault was, fortunately, less significant than what it often is in cases that come before the courts, there were some aggravating features to it: the victim was assaulted in her own home, in her own bed. She was also assaulted at a time where she was particularly vulnerable, as she was asleep.

[56] In addition, these types of offenses are very prevalent in the Northwest Territories. The rate at which women are sexually assaulted, to various degrees, when they are asleep, is appalling. This has been the subject of comments in all levels of courts in this jurisdiction for a number of years. Often, these comments are made in the context of cases that involve much more serious assaults than what happened here. Still, the prevalence of this problem in this jurisdiction has led the courts to find, consistently, that denunciation and deterrence must be the paramount sentencing considerations in these cases.

[57] To the extent that the excerpt quoted above can be interpreted as a general statement that a sexual assault committed in these circumstances (on a victim who is asleep in her own bed in her own home) does not warrant the imposition of a jail term, with the greatest of respect to the Sentencing Judge, I disagree. In my respectful view, it ordinarily would, in order to adequately address the need for deterrence and denunciation of this type of conduct, especially when the person committing the offence is not a first offender and is already facing other charges. In this regard I agree with the analysis set out in *R.* v. *Blake* [2001] N.W.T.J. No. 85 and *R.* v. *Bouvier* 2007 NWTTC.

[58] Ultimately, however, the issue on this appeal remains whether the sentence imposed was demonstrably unfit in the specific circumstances of this case. The Sentencing Judge placed considerable emphasis on the guilty pleas, as well as on Mr. William's medical issues. Sentencing is a highly individualized, fact-driven, discretionary process. The Sentencing Judge's assessment and weighing of the competing factors and sentencing principles must be extended considerable deference.

[59] The sentence imposed was outside the range of sentence that would ordinarily be appropriate for the sexual assault. The overall sentence can also be characterized as very lenient, considering the number of offenses committed and the fact that they were all committed while Mr. William was on process, facing other charges. Nevertheless, on the whole of the circumstances, many of which were unique, I have concluded that the sentence is not demonstrably unfit and ought not to be disturbed.

[60] The appeal is dismissed.

L.A. Charbonneau
J.S.C.

Dated this 6th day of July 2012.

Counsel for the Applicant: Jessica Patterson
Counsel for the Respondent: Charles Davison

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